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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 232

FRANK H. HILLS, ET AL.,
Petitioners

vs.

COLONEL EISENHART, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioners, Frank H. Hills, Cecil La Mar, Arthur D. Dunkelburger, Calvin Winkler, Lloyd Barker, Alan Widener, Eual Blansett, Andrew O. Stanley, and Arthur Bowland, Appellants below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on June 17, 1958. (R. 67-72)

OPINIONS BELOW

The Judge of the United States District Court for the Northern District of California did not render an opinion. The opinion of the United States Court of Appeals for the Ninth Circuit is set forth on pages 17-23 of the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 17 (A. 17). This application for a writ of certiorari is filed within ninety days from that date as provided may be done under the provisions of Title 28, Section 2101(e) of the United States Code.

QUESTIONS INVOLVED ON APPEAL

1. Whether permanent civil service employees of the United States, some of whom have veterans preference, employed at the Travis Air Force Base in California may be replaced in their positions and grades by military personnel.

2. Whether the United States District Court for the Northern District of California has jurisdiction to issue an injunction restraining the officers of the Travis Air Force Base from replacing civilian employees with permanent civil service status with military personnel.

3. Whether permanent civil service employees, some of whom have veterans preference, have a right of appeal to the United States Civil Service Commission where they are about to be unlawfully replaced with military personnel, and if so, does the administrative right of appeal, if such exists, have to be fully exhausted before resorting to the Courts to protect their rights as civil service employees of the United States.

STATUTES INVOLVED

"Sec. 652. *Removal from classified civil service only for cause.* No person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy there-

of, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation."

5 U. S. C. 652.

Title 5, Sec. 861. Reduction in personnel; considerations affecting release.

In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: Provided, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: Provided furthur, That preference employees who efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: And provided further, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

5 U.S.C. 863

"No permanent or indefinite preference eligible, who had completed a probationary or trial period

employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore preferred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, *specifically and in detail,* for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in suport of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: Provided, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative office and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: Provided further, That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 864 of this title. (June 27, 1944, c. 287, Sec. 14, 58 Stat. 390)

STATEMENT OF THE FACTS

The petitioners, plaintiffs below, are all employed as permanent civil service employees of the United States at the Travis Air Force Base in the State of California. The respondents are the officers in charge of the Travis Air Force Base. The complaint alleges that the respondents, defendants below, had threatened, and would unless enjoined, to discharge the petitioners from their positions and grades at the Travis Air Force Base in violation of Section 652, and Section 861 of Title 5 of the United States Code, and replace them with military personnel. The suit was brought in the United States District Court for the Northern District of California. (R. 41-46). The complaint alleged the controversy, and that the matter in controversy exceeded the sum of Three Thousand Dollars exclusive of interest and costs.

The complaint prayed for a temporary injunctional order, a preliminary injunction, and a permanent injunction, and also for a declaratory judgment declaring the respective rights of the parties, and for such other and further relief as to the Court might seem to be proper. (R. 46). A temporary injunction was issued.

No testimony was taken in the case for the reason that the respondents filed a motion to dismiss. After hearing argument of respective counsel for the parties, the District Court dismissed the complaint. (R. 62-63).

An appeal was then taken to the United States Court of Appeals for the Ninth Circuit. In the meantime, the injunctional order issued was continued in force pending the appeal to the Court of Appeals.

The appeal was heard by the Judges of the Court of Appeals on December 16, 1957. The Court of Appeals decided the case on June 17, 1958 (A. 17), one Judge dissenting, affirming the decision of the District Court. The injunctional order is still in force. The Court of Ap-

peals has stayed the issuance of the mandate to and including July 31, 1958 provided that a writ of certiorari is filed in this Court prior to that time.

SPECIFICATIONS OF ERRORS TO BE URGED

The petitioners will urge that the decision of the United States Court of Appeals for the Ninth Circuit, one Judge dissenting, conflicts with the decisions of this Honorable Court, and the decisions of United States Courts of Appeals in other Circuits.

The petitioners will urge that their rights as permanent civil service employees, some of whom had veterans preference, were to be wilfully and unlawfully violated by the respondents as alleged in the complaint. It will be further urged that the petitioners had no right of appeal to the United States Civil Service Commission in the situation in which they found themselves, and even if such a right of appeal existed, the actions contemplated by the respondents was of such an unlawful nature that injunctional relief should have been granted in any event. The petitioners contend that the United States District Court for the Northern District of California had full, complete and adequate jurisdiction over the parties, and the subject matter of the litigation and that the District Court clearly erred in dismissing the complaint, and the said Court of Appeals again erred in affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The petitioners assert that a writ of certiorari should issue in this case to review the decision of the United States Court of Appeals for the Ninth Circuit pursuant to Rule 19, 1 (b) of the rules of this Court for the reasons that the Court of Appeals below had decided an important question of federal law in conflict with the decisions of this Court, and in conflict with the decisions of United

States Courts of Appeals of other Circuits on the question of exhausting administrative remedies before resorting to the Courts.

The decisions relied upon will be specifically called to the attention of the Court.

At the very outset petitioners want to state that it would be most difficult to state the position of the petitioners in this case, and the authorities relied upon with more clarity than the splendid dissenting opinion of the distinguished Jurist Pope who obviously searched well the authorities and whose opinion in this case appears to the petitioners to be unanswerable.

Petitioners well recognize the rule that in ordinary cases where there is an issue of fact and the right of appeal exists to an administrative board that such appeal rights must be first exhausted before bringing an action in the Courts.

The rule in those cases does not aply to this case. It has long since been the ruling of this Court, and the Courts of Appeals for the various Circuits, that where public officials are acting clearly contrary to law that their unlawful acts may be restrained without exhausting any appeal rights that may or might have existed.

One of the early cases in point on this question is the case of *Skinner & Eddy Corp. v. United States, 249 U.S. 557, 562* in which this Court held that the Interstate Commerce Commission could be restrained from placing into effect an order authorizing an increase in westbound transcontinental freight rates clearly in excess of their authority. This Court held that if the order had been a valid one the right of appeal would have to be exhausted, but where there was a total absence of authority to issue such an order, the Commission could be restrained without exhausting the right of appeal.

The United States Court of Appeals for the First Circuit followed the rule in the Skinner & Eddy Corp. case in the case of *Wyttre v. Hague, 168 Fed. 2d 500.* In that case, a suit by civil service employees and veteran preference eligibles in the Boston Naval Shipyard, the Court of Appeals held that their reductions in grade were unlawful, and that their rights would be protected without exhausting the rights of appeal to the United States Civil Service Commission.

There is a long line of authorities to support this exception to the general rule.

Colorado v. Toll, 268 U.S. 228, 69 L.Ed. 927.
Roberts v. United States, 176 U.S. 221, 229, 231, 44 L.Ed. 443.
Waite v. Macy, 246 U.S. 606, 62 L.Ed. 893.
Miguel v. McCarl, 291 U.S. 442, 78 L.Ed. 901.
Farley v. United States, 92 F.2d 533, 67 App. D.C. 382.
Dunlap v. Black, 128 U.S. 40, 48, 32 L.Ed. 354.
Wilbur v. United States, 281 U.S. 206, 218, 222, 74 L.Ed. 809.
United States v. Wilbur, 83 U.S. 414, 75 L.Ed. 1148.
Hammond v. Hull, 131 F.2d 23 (App. D.C.)
Noce v. Hill, 76 F.2d 198 (9th CCA)
Ferris v. Wilbur, 27 F.2d 262, 264 (4th CCA)
Work, Secretary v. Louisiana, 269 U.S. 250, 70 L.Ed. 259.
Dragna v. Landon, 209 F.2d, 26, 28, 9th CCA

The majority opinion of the Court of Appeals below conflicts with the decisions of this Court, and the other Courts of Appeals in the cases cited, and in fact conflicts with the decision of that Court in the case of Dragna v. Landon, supra.

There can be no question that the discharging of the petitioners from their rightful grades in governmental service was in direct violation of the Statutes of the United States which Congress had enacted to protect career employees of the United States such as these peti-

tioners. The statutes in this connection are cited on page 2-4 of this petition.

Where the civil service employee of the United States has obtained a permanent status, such as these petitioners had, they can only be removed from their positions in grade in accordance with the statutes providing for such removal.

The case of *Roth* v. *Brownell, 215 F.2d 500* is squarely in point as those of these petitioners who do not have veterans preference. Their rights are fully protected under Title 5, Section 652 of the United States Code quoted on pages 2-3 of this petition.

The remaining petitioners who have veterans preference may only be discharged from their positions and grades in accordance with Title 5, Section 861, and 863 of the United States Code quoted on pages 3-4 of this petition.

THE PETITIONERS HAD NO RIGHT OF APPEAL

The petitioners do not question the authority of the Respondents in a proper case to reduce the force of civilian employees in the Travis Air Force Base. If ordered by the Secretary of Defense, such a reduction in force may be accomplished. But the order to reduce the force in this case specifically provided that the civilian employees would not be affected by the order of reduction.

What was done in this case by the Respondents was not in effect a reduction in force. There was no actual reduction in force of the civilian employees contemplated. What was intended to do was to replace these Petitioners with military personnel. So, there was not in fact any reduction in force. The Petitioners therefore had no right of appeal under Section 861 Title 5 U.S.C. because the facts in the case do not fall within the provisions of this section of the U.S. Code.

For the history of the Acts of Congress relating to preference granted to Honorably discharged soldiers and sailors of the United States, the Court's attention is invited to the opinion of Mr. Justice Black in the case of *Hilton* v. *Sillivan, Sec. of the Navy, 334 U.S. 322, 92 L.Ed. 1416*, and also to the case of *Reynolds et al.* v. *Lovett et al., 201 F.2d. 181, D.C. Cir. Certiorari denied, 345 U.S. 926.*

In the concurring opinion of Mr. Justice Clark in the case of Reynolds et al. v. Lovett et al., supra, he stated that the conduct of the public officials in failing to accord the veterans their full rights was a greater menace to the country than the threat of the atom bomb.

This case falls well within the comment of Mr. Justice Clark in the Reynolds case.

The petitioners who were veterans had no right of appeal to the Civil Service Commission because there was not an actual reduction in force. The other petitioners whose rights were protected under Title 5, Section 652 also had no right of appeal to the Civil Service Commission.

Where such a situation exists, this Court has passed squarely on the question.

In the case of *Steele* v. *Louisville & Nashville Railroad Company, 323 U.S. 192, 89 L.Ed. 173* a railroad employee brought a suit to enforce certain rights. The statute gave him no right of appeal to any agency or department the right of enforcement of such rights. This Court held that the right of action was not precluded by the possibility of an administrative remedy. This case would appear to be in point.

The Petitioners had no right of appeal under Title 5, Section 863 U.S. Code pages 3-4 of this petition for the reason as stated by the dissenting Judge this section only applies to those cases where charges are filed against the governmental employees. In this connection the Court's

attention is invited to the case of *Ashley* v. *Ross, 191 F.2d 665, 89 U.S. App. D.C. 339* holding that the 30 days notice in Section 863 does not apply to reduction in force cases.

The Petitioners who were career employees without veterans preference definitely did not have any right of appeal to the United States Civil Service Commission.

The record discloses a communication from the Regional Office of the United States Civil Service Commission located at San Francisco, California which shows that there was no right of appeal to the Commission from the situation in which the Petitioners found themselves. (R. 13)

CONCLUSION

This case is of the utmost importance to permanent civil service employees now being employed in the various Air Force Bases, and other Military bases for the reason that if the right to replace such employees by military personnel is finally sustained by the Courts, it may well be expected that military personnel will replace all such permanent civil service employees and this may well include the civilian personnel employed in the Army, Navy, Air Force under the jurisdiction of the Secretary of Defense, and that the government will be eventually administered by men and women in uniform subject to Court martial proceedings. Congress by the establishment of the Civil Service laws intended that the work would be performed by employees qualified by the Civil Service Commission and not by the military authorities. Any unlawful attempt to substitute military personnel for permanent civil service employees should be halted at the earliest possible moment. The unlawful actions contemplated by the Respondents should be restrained by proper injunctional orders. The facts in this case disclose a case which is clearly within the rules of this Court authorizing the issuance of the writ of certiorari and that writ should be granted.

WHEREFORE, the Petitioners pray that a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit issue in this case, and that upon a review by this Court, that the judgment of the said Court of Appeals be in all things reversed and vacated, and that the case be returned for further proceedings in accordance with the views of this Court.

Respectfully submitted,

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